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Nos. 95-124 and 95-227

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL., RESPONDENTS

ALLIANCE FOR COMMUNITY MEDIA, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL,. RESPONDENTS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTRODUCTION

The Attorney General of the State of New York (hereinafter "New York") submits this brief in support of Respondent FCC's position that the FCC orders governing indecent programming which implement the Cable Television Consumer Protection and

Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, are constitutional. Specifically, New York supports the FCC's position that Section 10b of the 1992 Act requiring "segregation and blocking" is a valid exercise of the government's power to protect the well-being of minors and thus meets the "compelling interest" test.

INTEREST OF NEW YORK

New York has a long tradition of protecting the well-being of minors. Consistent with that tradition, New York has a clear interest in the segregation and blocking requirements imposed by the 1992 Act and implementing regulations.[1]

SUMMARY OF ARGUMENT

A line of United States Supreme Court decisions underscores the government's compelling interest in protecting minors. This interest is particularly relevant for material broadcast on cable television, which reaches a broad audience including children. In New York State the legislature and courts have recognized this compelling interest and taken steps to protect children from indecent and obscene material.

[1]The New York State Senate approved Resolution No. 2141 on January 9, 1996 to recognize the concern of the people of the State of New York regarding obscene and indecent television programming carried on leased access cable television channels, and to "support and endorse the concepts for control of indecent and obscene programming on leased access cable channels embodied in the 1992 Federal Communications Act."

ARGUMENT

THE SEGREGATION AND BLOCKING REQUIREMENTS ARE PERMISSIBLE BECAUSE THE GOVERNMENT HAS A COMPELLING INTEREST IN PROTECTING THE PHYSICAL AND PSYCHOLOGICAL WELL-BEING OF MINORS

In a line of decisions that includes *Ginsberg v. New York*, 390 U.S. 629 (1968) and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), this Court has reiterated and underscored the government's compelling interest in protecting "the physical and psychological well-being of minors." *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).[2]

This interest has been articulated in many fashions and with respect to many mediums, but is particularly relevant for material broadcast on radio and television. In *FCC v. Pacifica Foundation, supra,* the Court noted that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans," 438 U.S. at 748, and concluded:

> "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Ibid.*

[2]This *amicus* brief neither addresses the "state action" issue nor in any way condones preemption of state regulation of cable access channels. This brief also does not address whether segregation and blocking are the least restrictive means to protect minors.

The court below noted that "[n]early fifty-six million households, more than sixty percent of all households with televisions, subscribe to cable service." *Alliance for Community Media v. FCC*, 56 F. 3d 105, 124 (D.C. Cir. 1995). Data maintained by the Public Service Commission, the state agency responsible for regulating the cable television industry, indicate that in New York State approximately 1.5 million households with cable service contain minors under 18 years of age. This is a substantial audience which justifies significant legislative and judicial attention.

There is no doubt that cable programming includes readily accessible indecent material. The legislative history set forth in the congressional record accompanying the 1992 Act is replete with examples of viewers' concerns, including correspondence from New York. 138 *Cong Rec.* S646-49 (daily ed. Jan. 30, 1992).

In *Ginsberg v. New York, supra*, this Court held that "the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society" and that "[p]arents...who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." 390 U.S. at 639. Recognizing the compelling government interest, articulated by this Court, New York State has adopted statutory provisions to protect children from exposure to indecent and obscene material.

For instance, Penal Law §235.21 makes it a class E felony to disseminate indecent material to minors in New York State. In *Bookcase, Inc. v. Broderick*, 218 N.E. 2d 668 (1966), the New York Court of Appeals upheld the constitutionality of an earlier version

(Penal Law 1909 §484-h) of that statute. *See also People v. Kahan*, 206 N.E. 2d 333 (1965); *Ginsberg v. New York, supra*, 390 U.S. at 638-40. In reaching its decision, the Court of Appeals gave great weight to the legislative finding that such literature is "a contributing factor to juvenile crime, a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state." *Bookcase, Inc. v. Broderick, supra*, 218 N.E. 2d at 673. We respectfully submit that the legislative interest in regulating indecent cable programming, which is carried directly into subscribers' homes, is at least as compelling as the government interest in regulating indecent literature which is available for purchase outside the home.

CONCLUSION

The opinion of the Court of Appeals for the District of Columbia Circuit properly applies the compelling interest test to protect the well-being of children and in this respect should be upheld.

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Respectfully submitted,

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